LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
JUN 14 1965
JOHN F. DAVIS, CLERK

No. 259

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

GERALD GEORGE TOMASZEK,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, AND TO THE SUPREME COURT OF ILLINOIS.

FRANK G. WHALEN
111 West Washington Street
Chicago, Illinois 60602
Attorney for Petitioner
Gerald George Tomaszek

The Scheffer Press, Inc.—ANdover 3-6850

SUBJECT INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	2
STATEMENT OF CASE	2
REASONS FOR GRANTING WRIT	4
CONCLUSION	6

INDEX TO APPENDICES

OPINION BELOW	Appendix A	1a
ORDER DENYING PETITION FOR LEAVE TO APPEAL	Appendix B	10a
JUDGMENT BELOW	Appendix C	11a

AUTHORITIES CITED

CASES:

Brown v. Mississippi, 297 U.S. 278	6
Holt v. U.S., 218 U.S. 245	5
Leyna v. Denno, 347 U.S. 556	5
Rochin v. California, 342 U.S. 165	5
Womack v. U.S., 294 F. 2d 204, Certiorari denied, 81 S. Ct. 826, 365 U.S. 859	4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

No.

GERALD GEORGE TOMASZEK,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT, AND TO THE SUPREME COURT OF ILLINOIS.

Petitioner, Gerald George Tomaszek, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, First District, affirming his conviction for theft and revoking the probation previously granted, and the order of the Supreme Court of Illinois denying petitioner's petition for leave to appeal.

Opinions Below.

The opinion of the Illinois Appellate Court, First District, affirming petitioner's conviction is reported in full in 54 Ill. App. 2d 254 and is appended to Appendix A in this petition. A timely petition was filed with the Illinois Supreme Court requesting leave to appeal but such petition was denied without opinion, see Appendix B. The

significance of the latter denial is the same as though a writ of certiorari were denied in this court.

Jurisdiction.

The judgment of the Illinois Appellate Court, First District, was entered on December 7, 1964, and petition for rehearing was denied by the same court on December 30, 1964. A timely petition for leave to appeal was filed with the Illinois Supreme Court and was denied on March 16, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

Can a defendant on cross examination be compelled to wear certain eyeglasses found at the scene, not for identification purposes but for the purpose of allowing a jury to determine or speculate that the eyeglasses are his property, without compelling defendant to be a witness against himself and depriving him of a fair and impartial hearing in violation of the Fifth and Fourteenth Amendments?

Constitutional Provisions.

The only constitutional provisions, treaties, statutes, ordinances or regulations involved are the Fifth and Fourteenth Amendments to the Federal Constitution.

Statement of Case.

On September 12, 1962, certain articles were stolen from the trunk of an automobile. A police officer, who had known defendant for three years, testified he observed him sitting in the driver's seat of a 1955 Oldsmobile (R. 262). He pursued the Oldsmobile in a brown squad car, then lost sight of it (R. 268) and later arrested defendant in a high school for girls after being waved to the

building by an unknown witness. When he first observed defendant, defendant was wearing glasses.

An officer in another squad car following the Oldsmobile and the brown squad car came upon the Oldsmobile stopped in an alley and observed defendant in the driver's seat (R. 185-186), and saw another man in the front seat on the passenger's side. The defendant got out of the car on the driver's side and the other man, who has never been apprehended, got out on the passenger's side of the car carrying a suitcase. This man dropped the suitcase a short distance away (R. 186) that contained the eye glasses the State contended belonged to the defendant (R. 189-190).

A police officer testified that after the arrest at the police station defendant admitted the eyeglasses belonged to him. The defendant denied this conversation. The defendant further denied that he was in the 1955 Oldsmobile and stated that he ran into the high school building because while walking on the street a man shouted "Stop or I'll shoot," and he started to run to look for a place to hide.

On cross examination over the objection of the defendant the State placed the eyeglasses which had been admitted into evidence on the face of the defendant, and also cross examined him as to whether or not he could see out of these glasses (R. 412), whether it was a fact that he could see out of these glasses as well as he could see out of his own, whether the glasses were for a nearsighted or farsighted person, whether they were similar to his prescription glasses, and asked what type of person who has eye trouble would wear these glasses (R. 413), inquired as to whether or not he could see out of the glasses, and whether the glasses were for a person who suffers from an eye disorder (R. 414).

The objection to the placing of the eyeglasses on the defendant was raised in the trial court record 412, 413, 414, and the motion for new trial (R. 119-120), in the briefs in the Illinois Appellate Court, First District, and in the Supreme Court of Illinois (R. 543).

Reasons For Granting The Writ.

Conceding that a defendant in a criminal case, having taken the stand in his own defense, can be compelled to exhibit his body or perform an act to supply a link in the prosecution's case, it does not necessarily follow that he can be compelled to perform an act that would make a mockery out of the trial or offend a sense of justice or be contrary to a community sense of fair play and decency.

If defendant were ordered to place the glasses on his face or remove them for the purpose of identification, defendant would say no more. But, to place glasses on the face of defendant for the purpose of allowing a lay jury to determine and speculate as to whether or not those glasses are in fact the property of the defendant, to guess or surmise that the shape of the glasses are such as the defendant in all probability would wear, that the rims of the glasses appear to be such as the defendant would desire, that the glasses from all physical appearances seem to set fairly well, and that, therefore, there is some reason for believing that the glasses might belong to the defendant, reduces the trial to a farce. Twelve opthamologists sitting in the jury box would not even attempt to decide the question.

> "None but the facts having rational probative value are admissible." 3 Wigmore, Evidence, §9.
>
> "The proffered evidence must have something more than a minimum of probative value." *Womack* v. *U.S.*, 294 Fed. 2d 204; Certiorari denied, 81 S. Ct. 826, 365 U.S. 859.

The opinion in *Holt* v. *U.S.*, 218 U.S. 245, 252-253, wherein the Court held that an objection to the testimony of a witness that the defendant put a blouse on and it fitted him was based upon an extravagant extension of the Fifth Amendment, is not in point. Whether or not a blouse fits is a matter of common observation. The same is not true with reference to ownership of eyeglasses. Then, too, in the *Holt* case, the Court was careful to say that the evidence must be material. The Court stated at Page 253:

> "Moreover, we need not consider how far a court would go in compelling a man to exhibit himself. For when he is exhibited, whether voluntarily or by order, and even if the order goes too far, the evidence, if material, is competent."

Nor does petitioner have any argument against the folowing statement in Justice Douglas' concurring opinion in *Rochin* v. *California*, 342 U.S. 165, 179:

> "Of course an accused can be compelled to be present at the trial, to stand, to sit, to turn this way or that, and to try on a cap or a coat."

These are matters that can aid in the process of identification.

Petitioner is complaining about the persuasive effect of the claimed demonstrable evidence on the jury in a situation where it was impossible for the jury to draw any reasonable inferences. The required element of force need not be physical force; it can be exercised in subtler ways. *Leyna* v. *Denno*, 347 U.S. 556.

Convictions can not be brought about by methods that offend a sense of justice. *Brown* v. *Mississippi*, 297 U.S, 278, 285-286. The Court will exercise judgment upon the whole course of the proceedings in order to ascertain whether they offend cannons of decency or fairness.

CONCLUSION.

For the reason that the procedure followed violated petitioner's rights under the Fifth and Fourteenth Amendments petitioner prays that this writ of certiorari be granted.

Respectfully submitted,

FRANK G. WHALEN
Attorney for Petitioner
Gerald George Tomaszek
111 West Washington Street
Chicago, Illinois 60602

APPENDIX A.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error-Appellee,
v.
GERALD GEORGE TOMASZEK,
Plaintiff in Error-Appellant.

No. 49449

OPINION

On December 2, 1963, after a jury trial in which Gerald George Tomaszek was found guilty of the offense of theft, he was sentenced to the penitentiary for a term of from four to five years. After pronouncing sentence on the theft charge, the trial court then revoked probation granted defendant in 1960 on a charge of attempted burglary and on that charge sentenced defendant from four to five years, both sentences to run concurrently. Defendant appeals from the theft conviction and from the revocation of his probation on the attempted burglary charge.

As to the theft conviction, defendant contends error because (1) the jury verdict did not contain a finding of the value of the property stolen; (2) there was a fatal variance between the indictment and proof as to the ownership of the property stolen; and (3) prejudicial conduct by the State's Attorney, which violated defendant's constitutional privilege against self-incrimination, when the State's Attorney placed eyeglasses, in evidence, on defendant during cross-examination. As to the probation

revocation, defendant contends error because the order was not entered by the judge who granted the probation and because of the summary nature of the hearing.

In September, 1962, defendant was indicted for the offense of theft of property "of the value of more than one hundred fifty dollars, the property of Donald S. Kanak, intending to deprive said Donald S. Kanak permanently of the use and benefit of said property." The jury verdict found the defendant "guilty in manner and form as charged in the indictment."

The record shows that on September 12, 1962, Donald Kanak, while making a sales call, parked his company's 1962 Cadillac near his customer's store. In the trunk were a typewriter, a dictating machine, and two adding machines. When he returned, the car was gone, and he immediately reported the theft to the police.

Within an hour, police officer, John Hinchy, driving an unmarked police automobile, observed defendant, whom he had known for three years, driving a 1955 Oldsmobile, with another man in the car, sitting to his right. Defendant looked in Officer Hinchy's direction, put the car in reverse, and at a high rate of speed made a "U" turn over a median strip. The officer also made a "U" turn, put on his headlights and spotlight, and pursued the Oldsmobile through a red light at a speed of 65 to 70 miles an hour. The Oldsmobile attempted to make a turn, skidded and came to a stop, with the police automobile stopping behind it. Officer Hinchy approached on foot, and from the rear of the car shouted he was a police officer, to get out of the car, and that they were under arrest. Defendant started the car in reverse motion, toward the officer, who jumped aside and fired several shots at the right rear tire, deflating it. The car pulled away at a high rate of speed, with Officer Hinchy pursuing it, until he lost sight of the car.

As the officer continued looking for the Oldsmobile, some man waved in the direction of a school, which the officer entered, found defendant and took him into custody. On searching defendant, the officer found two sets of keys. A short time later, he found the 1955 Oldsmobile in a nearby alley, and in it was a typewriter and adding machine. With the keys taken from the defendant, which fitted the trunk and the ignition of the car, he opened the trunk and found several office machines, a tire and wheel, and a briefcase.

Donald Kanak testified that he was employed by Kanak & Sons, Inc., sold office machines, and was its treasurer. On September 12, 1962, he placed items of office equipment in a 1962 Cadillac which the corporation owned and for which it paid $5200. While he was making a sales call, the car was stolen. That afternoon, at "5th Area, Burglary," he identified a typewriter, two adding machines, a dictating machine, a briefcase, and a tire, as articles that were in his care, custody and control from the time he left Kanak & Sons until the Cadillac was stolen. The items were then returned to him. He identified the articles by means of a police photograph in evidence. He testified that the value of the typewriter was $279; the value of the dictating machine was $250; the value of the two adding machines was $350 and $335. He stated that all of the items were the property of Kanak & Sons with the exception of the typewriter.

Two other police officers testified that, in another squad car, they joined Officer Hinchy in pursuit of the Oldsmobile. One of them identified defendant as the driver and as the man who, while fleeing from the Oldsmobile, dropped a valise in which was found a pair of eyeglasses. At that time, defendant was not wearing glasses.

Officer Hinchy testified defendant was wearing eyeglasses when he first saw him in the Oldsmobile, but that defendant was not wearing glasses when arrested. Another police officer testified that at "Area 5" headquarters, he questioned defendant about a pair of eyeglasses found in the valise dropped by defendant. He asked defendant, "Are these your glasses?" and defendant said they were. He further said, "You need them, don't you?" and defendant said, "Yes, I do." Defendant then put on the glasses for a few minutes. The officer then returned the glasses "to inventory." On cross-examination, this officer testified that the glasses were "prescription glasses," and after an investigation, he was unable to identify the glasses "as belonging to or prescribed for the defendant." Over objection, the eyeglasses were received in evidence as People's Exhibit 5.

Defendant testified in his own behalf. On the day in question, he had worked from eight o'clock in the morning until noon. While looking for an apartment, he heard a lot of shouting and turned around to see a man, dressed in civilian clothes, with a gun in his hand. Defendant started to run down the street, and as the man started to fire the gun, defendant ran into the school. "I had seen Sergeant Hinchy on two or three occasions before this time. I saw him in a tavern where I go once in a while • • • . I was walking out of the door of the Seneca High School when Sergeant Hinchy was walking in. He grabbed me, put a gun on me, threw me against the wall, searched me and took my house keys. Exhibits 7 and 7a are the keys for my mother's house that Sergeant Hinchy took from me. The other set of keys that are on a separate chain were not taken from me. I saw Mr. Hinchy in the Seneca High School but I had not seen him before that day."

Defendant denied any knowledge or control of the 1962 Cadillac or of any of the articles identified as being stolen. He denied operating a 1955 Oldsmobile or any other car on September 12. When arrested, he was wearing "prescription sun glasses." He denied ownership of the eyeglasses previously identified as People's Exhibit 5, or that he had told any police officer that he needed them or owned them. On cross-examination, and at the request of the State's Attorney, and over objection, defendant put on the glasses (People's Exhibit 5) and was questioned as to their type and his ability to use them.

Initially, we consider defendant's contention that the verdict is void because it failed "to contain a finding that the value of the articles exceeded $150." Defendant cites the penalty provision of the Criminal Code of 1961 (Ill. Rev. Stat., Ch. 38, § 16-1, effective January 1, 1962), which provides:

> "• • • A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years."

He also cites cases which hold in substance that "a general verdict of guilty is not enough where the place of imprisonment depends upon the value of the property involved." *People* v. *Jackson* 312 Ill. 611, 612, 144 N.E. 314 (1924), and *People* v. *Swinson*, 406 Ill. 233, 92 N.E. 2d 758 (1950), where the court stated (p. 237):

> "The value of the property taken is a material fact necessary to establish the type of larceny charged; that value must be specifically found by the jury and be incorporated in its verdict."

See, also, *People* v. *Smithka*, 356 Ill. 624, 627, 191 N.E. 211 (1934).

The State contends that the verdict is valid because there was no evidence to warrant an instruction for a ver-

dict for a lesser offense, and if defendant desired that a formal verdict for a lesser offense be given, it was his duty to prepare and ask for such instruction to the jury, and having failed to avail himself of that right, he is in no position to complain. *People* v. *Green*, 27 Ill. 2d 39, 44, 187 N.E. 2d 708 (1963).

We hold that no error was committed in submitting a general verdict to the jury in this case. There was no issue raised as to the value of the property stolen, and as the evidence affirmatively established the property value to be well in excess of $150, a finding by the jury as to its value was unnecessary. In fact, "where there is no conflict in the evidence as to the value and it is clearly in excess of $50, there is no error in refusing instructions on petty larceny." (*People* v. *Rogers*, 16 Ill. 2d 175, 182, 157 N.E. 2d 28 (1959).) There being no question of fact as to value, the jury's function was discharged when it found defendant "guilty in manner and form as charged in the indictment."

Defendant next contends that there was a fatal variance between the proof and the charges in the indictment. He argues, "The proof showed the articles were not owned by Donald S. Kanak but were owned by Kanak & Sons, Incorporated, except the Royal typewriter which was the property of the Royal Typewriter Company. The articles themselves were not introduced into evidence but pictures of the articles were introduced into evidence over the objection of the defendant." Cited are *Aldrich* v. *The People*, 225 Ill. 610, 80 N.E. 320 (1907), and *People* v. *Quinn*, 411 Ill. 97, 103 N.E. 2d 81 (1952).

The 1961 Criminal Code includes a definition of "owner," which we believe is determinative of the question of ownership in this case. Section 15-2 states:

> "• • • 'owner' means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property."

As Donald Kanak, the complainant, had possession of the stolen property as salesman for the legal owners, we find this possession was sufficient proof of ownership here, as against one who has stolen the property. See, also, *People* v. *Hansen*, 28 Ill. 2d 322, 339, 192 N.E. 2d 359 (1963). We find no variance in proof as to ownership.

Defendant next contends that "the forcible placing of eyeglasses on the defendant by the State during cross-examination of the defendant violated defendant's guaranty against compulsory self-incrimination in violation of the Fifth Amendment of the Federal Constitution and constituted prejudicial conduct and deprived defendant of a fair trial." Cited is *Allen* v. *State of Maryland*, 183 Md. 603, 39 A.2d 820, where it was held to be improper to compel a defendant to try on a hat during cross-examination.

Compelling a defendant, on cross-examination, to exhibit himself or perform some action, if material to an issue in the case, is not testimonial compulsion. In *People* v. *Munziato*, 24 Ill. 2d 432, 436, 182 N.E. 2d 199 (1962), our Supreme Court, in discussing illustrations of "compelled conduct to which the privilege does not extend" cited 8 Wigmore on Evidence, 3rd Ed., § 2265, where it is said:

> "Unless some attempt is made to secure a communication—written, oral or otherwise—upon which reliance is to be placed as involving his conciousness of the facts and the operations of his mind in ex-

pressing it, the demand made upon him is not a testimonial one."

The privilege against self-incrimination extends only to testimonial compulsion and "not an exclusion of his body as evidence when it may be material." (*Holt* v. *United States,* 218 U.S. 245, 252-3 (1910).) See Also, McCormick on Evidence, § 126, p. 263; *Rochin* v. *California,* 342 U.S. 165, 179, 96 L. Ed. 183 72 S. Ct. 205 (1952); *People* v. *Curran,* 286 Ill. 302, 310 121 N.E. 637 (1919); 171 A.L.R. 1144 (1948).

On cross-examination the request to the defendant to put on eyeglasses, in evidence, was not testimonial compulsion, and, therefore, was not within the scope of the privilege against self-incrimination. Nor do we find it to be prejudicial conduct such as to deprive defendant of a fair trial. The glasses were in evidence, the defendant had denied they were his, and the ownership of the glasses was relevant and a material issue in the case. We find no error here.

As to the revocation of his probation, defendant argues that "the interest of justice and orderly procedure would seem to indicate that Judge William V. Daly who granted the probation should be the judge who would revoke the probation and fix the sentence. * * * and there was no showing as to why the matter could not be assigned to him for immediate hearing." Defendant also complains that the hearing on the revocation was conducted in a summary fashion, and that a harsh sentence was imposed.

The record shows that on September 19, 1962, a warrant was issued for the arrest of the defendant for the violation of his probation, and on January 10, 1963, a rule was entered against defendant to show why his probation should not be terminated. There were a number of con-

tinuances, and on the date of the revocation order, December 2, 1963, the court said: "There is no question under the evidence that was produced in court, he has flagrantly violated his probation. * * * This violation of probation should have been taken care of a long, long time ago."

The revocation procedure followed was substantially in accord with the provisions of paragraph 789.1, entitled "Procedure upon alleged violation of probation," and as the sentence was concurrent with that given for the offense which caused the revocation, we fail to see that a "harsh sentence" was imposed.

Neither do we consider it improper for probation to be revoked by a judge other than the judge who entered the probation order in a situation similar to the instant one. Paragraph 786 provides that "a cause continued pursuant to the provisions of this Act shall be deemed subject to the jurisdiction of the court in which it is pending, *or any judge thereof*, for the full period of its continuance, during which time orders may be entered with respect to the conditions of probation, or final sentence imposed without the formal setting aside of such order of continuance." (Emphasis supplied.) We find no error in the revocation of defendant's 1960 grant of probation.

For the reasons given, both judgments and sentences appealed from are affirmed.

AFFIRMED.

APPENDIX B.

IN THE

SUPREME COURT OF ILLINOIS

NO. 39155

PEOPLE STATE OF ILLINOIS, Respondent, vs. GERALD GEORGE TOMASZEK, Petitioner.	Petition for Leave to Appeal from Appellate Court First District 59-2869 62-2047 49449

And now on this day the Court having duly considered the Petition for Leave to Appeal herein as well as the record and abstract, filed in support thereof, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 27th day of March, 1965.

/s/ Mrs. Earle Benjamin Searcy

Clerk,

Supreme Court of the State of Illinois

(Seal)

APPENDIX C.

IN THE

CRIMINAL COURT OF COOK COUNTY, ILLINOIS

PEOPLE STATE OF ILLINOIS, Respondent, vs. GERALD GEORGE TOMASZEK, Petitioner.	Gen. No. 62-2047 Indictment for Theft

JUDGMENT

Therefore, it is Considered, Ordered and Adjudged by the Court that the said Defendant Gerald George Tomaszek is guilty of the said crime of Theft in manner and form as charged in the indictment in this cause on the said Verdict Of Guilty.

Therefore, it is Ordered and Adjudged by the Court that the said Defendant Gerald George Tomaszek be and he hereby is sentenced to the Illinois State Penitentiary for the crime of Theft in manner and form as charged in the indictment whereof he stands convicted, for a term of years not less than Four (4) Years, Nor more than Five (5) Years, for the crime whereof he stands convicted, And It Is Further Ordered and Adjudged that the said Defendant Gerald George Tomaszek be taken from the bar of the Court to the Common Jail of Cook County, and from thence by the Sheriff of Cook County to the Illinois State Penitentiary and be delivered to the De-

partment of Public Safety and the said Department of Public Safety is hereby required and commanded to take the body of the said defendant Gerald George Tomaszek and confine him in said Penitentiary, according to law, from and after the delivery thereof until discharged according to law, provided such term of imprisonment in said Penitentiary shall not be less than Four (4) Years, nor more than Five (5) Years, for the crime for which said defendant was convicted and sentenced.

It Is Further Ordered that the said Defendant pay all the cost of these proceedings, and that execution issue therefor.